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No. 06-112

In the Supreme Court of the United States

HENRY TORROMEO, *et al.*,
Petitioners,

v.

TOWN OF FREMONT, NEW HAMPSHIRE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Do compelling reasons exist to review the First Circuit's dismissal of Petitioners' federal takings claims where the federal takings claims were asserted and decided in the underlying state court action and the First Circuit's dismissal is completely consistent with this Court's recent decision in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005)?

II. Do compelling reasons exist to review the First Circuit's dismissal of Petitioners' substantive due process claim in light of the fact that the standard employed by the First Circuit is consistent with this Court's prior decisions, including its recent decision in *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003)?

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INTRODUCTION

The Petition for Writ of Certiorari (the "Petition") should be denied because it fails to demonstrate "compelling reasons" that warrant appellate review by this Court. *See* Sup. Ct. R. 10. Petitioners first contend that the First Circuit erred in dismissing their federal takings claims based on *res judicata* because Petitioners never asserted a federal takings claim in the state-court action. Petitioners' position is directly contradicted by the pleadings filed in the state-court action. Indeed, Petitioners spent two pages in their state-court complaint asserting takings claims based on the "Fifth Amendment" with specific citation to federal law. What is more, when the New Hampshire Supreme Court rejected Petitioners' takings claim, Petitioners filed a Petition for Writ of Certiorari with this Court seeking review of their takings claims under the Fifth Amendment Takings Clause. Finally, Petitioners' efforts to reconstrue the claims in the state-court action are belied by the federal Complaint they filed in this matter, which expressly acknowledges that the purpose of the state-court action was "to obtain just compensation for a taking under the U.S. and New Hampshire Constitution." It is disingenuous, at best, for Petitioners to now claim that they never asserted a federal takings claim in the state-court action.

Petitioners' alternative contention that their federal takings claims were not adjudicated because the claims were not ripe is similarly without merit based on this Court's recent decision in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005). In *San Remo*, this Court held that state courts may hear a plaintiff's request for compensation under state law simultaneously with an alternative claim that the denial of compensation violates the Fifth Amendment of the Federal Constitution. *Id.* Petitioners asserted both state and federal takings claims and, as such, the

federal takings claims were ripe for adjudication. What is more, even if Petitioners federal takings claims were not barred by *res judicata*, they would be barred by issue preclusion pursuant to *San Remo*. In *San Remo*, this Court held that where state takings law is coextensive with federal takings law and the state court concludes that no taking has occurred under state law, a plaintiff's subsequent effort to bring a federal takings action in federal court is barred by issue preclusion. *Id.* As Petitioners acknowledge, New Hampshire regards state and federal takings claims as equivalent. *See Sanderson v. Town of Candia*, 787 A.2d 167 (N.H. 2001). The New Hampshire Supreme Court rejected Petitioners' takings claims. Pursuant to *San Remo*, Petitioners' efforts to revive those claims in federal court are barred by issue preclusion.

Petitioners similarly fail to present compelling reasons for this Court to review the First Circuit's dismissal of their substantive due process claims. The standard employed by the First Circuit is consistent with this Court's previous rulings and consistent with the standards in other jurisdictions. The First Circuit's decision is also consistent with this Court's decision in *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003), in which this Court held that the refusal to issue building permits pursuant to an unconstitutional provision in a municipal charter does not violate substantive due process. Petitioners have failed to assert any basis for this Court to overturn the *Cuyahoga Falls* decision.

In short, Petitioners have failed to establish that compelling reasons exist for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

Respondent submits the following Statement of the Case in order to clarify certain misstatements and/or omissions in the Petition.

I. *The First State Court Action*

Petitioner Henry Torromeo ("Torromeo") is the developer of Mason's Corner, a twenty-seven lot residential subdivision in Fremont, New Hampshire (the "Town"). Pet. App. at 44a. The subdivision plan was approved by the Fremont Planning Board and recorded in February 1997. *Id.* Petitioner MDR Corporation ("MDR") is the developer of Glidden Hill Estates, a fourteen lot subdivision also located in Fremont. *Id.* at 22a. In 1999, the Town approved MDR's subdivision plan and MDR recorded the plan in the Rockingham County Registry of Deeds. *Id.*

In March 1999, the Town adopted a growth control ordinance (the "Ordinance") which authorized the Fremont Planning Board to limit the number of building permits issued annually for the construction of residential units within the Town. Pet. App. at 17a. Pursuant to the Ordinance, the Town implemented a "Growth Control and Permit Limitations," which limited to 16 the number of building permits that it would issue to property owners during the one-year period between April 14, 1999, and April 13, 2000. *Id.* Within that time frame, MDR requested fourteen permits to construct single-family units at Glidden Hill Estates. *Id.* The Town issued only five permits and informed MDR that it must wait until April 2000 before additional building permits would issue for that development. *Id.* at 18a. Torromeo also sought building permits for the five remaining lots at Mason's Corner. *Id.* The Town denied Torromeo's request because

it had already issued the maximum number of building permits for that year. *Id.*

In August 1999, Torromeo filed a petition for declaratory judgment in the Rockingham County Superior Court, claiming that because the Town approved his subdivision plan prior to adopting the Ordinance, he was exempt from the provisions of the Ordinance pursuant to New Hampshire law. Pet. App. at 18a. The trial court agreed and ordered the Town to issue the requested building permits. *Id.* The Town complied and issued the five building permits to Torromeo. *Id.*

MDR also filed a petition for declaratory judgment in the same court. Pet. App. at 18a. MDR argued that the Ordinance was invalid because the Town never legally adopted a capital improvement program ("CIP"), which, pursuant to New Hampshire law, is a prerequisite to the adoption of a growth control ordinance. *Id.* The trial court agreed, ruling that the Town failed to adopt a valid CIP and, therefore, the Ordinance was invalid *ab initio*. *Id.* The New Hampshire Supreme Court affirmed the decision on appeal. *Id.* The Town then issued the requested building permits to MDR. *Id.*

II. *The Second State Court Action*

In March 2000, Petitioners filed separate lawsuits against the Town in the New Hampshire Superior Court, seeking compensation for the temporary taking of their property during the period in which they were denied the building permits. Pet. App. at 75a-83a. The state-court complaints asserted that the Town's conduct violated both the Fifth Amendment of the United States Constitution and Pt. 1, Art. 12 of the New Hampshire Constitution and included more than a page of citations to decisions by this Court defining a

property owner's rights under the Fifth Amendment Takings Clause. *Id.* The cases were consolidated and, in March 2001, the trial court ruled that Petitioners were entitled to recover damages for economic loss due to the Town's attempted enforcement of the Ordinance. Pet App. at 58a-68a. The trial court subsequently awarded $71,600 to MDR and $23,800 to Torromeo. *Id.*

The Town appealed the decision to the New Hampshire Supreme Court. Pet. App. at 50a. In their joint brief, Petitioners cited both the state and federal constitutions in support of their view that the trial court had properly found that they were entitled to compensation for the temporary taking of their property. Pet. App. at 19a ("The Town, by imposing the invalid Growth Ordinance, caused a 'taking' of plaintiff's property violating their protected right to use and enjoy their property as a fundamental right protected by both our State and Federal Constitutions. . . ."); *Id.* at 20a ("The right to use and enjoy one's property is a fundamental right protected by both our State and Federal Constitution. The Fifth Amendment of the United [States] Constitution provides, 'nor shall private property be taken for public use without just compensation'.").

The New Hampshire Supreme Court concluded that Petitioners were not entitled to compensation and, therefore, reversed the trial court's damage award. Pet. App. at 43a-49a. Specifically, the court held that while the Ordinance had previously been declared invalid, Petitioners had not demonstrated that the Ordinance was unconstitutional. *Id.* at 48a. The court went on to discuss the distinction between a local ordinance that is unconstitutional and one that is merely unenforceable due to a procedural defect in its enactment. *Id.* It then noted that absent proof that the Ordinance was unconstitutional, rather than merely procedurally flawed,

"this case presents merely the type of municipal error for which judicial reversal of the erroneous action is the only remedy." *Id.* Accordingly, the New Hampshire Supreme Court held that Petitioners were "not entitled to damages, and . . . their only remedy [was] issuance of the erroneously-denied building permits." *Id.* at 48a-49a.

Petitioners then filed a Petition for Writ of Certiorari with this Court (Docket No. 02-1507). Res. App. at 1b. Again, Petitioners relied upon the United States Constitution in support of their view that they were entitled to compensation from the Town for the temporary taking of their property. In this regard, Petitioners identified the questions presented as "Liability for Fifth Amendment Taking" and "Remedy for Fifth Amendment Taking," and identified the constitutional provision at issue as the "Takings Clause of the Fifth Amendment to the United States Constitution." Res. App. at 2b-3b. In addition, the Petition stated that "Torromeo and MDR each filed actions in the Rockingham County Superior Court for a taking under the U.S. and (New Hampshire) Constitutions." *Id.* at 10b (parenthetical in original). This Court denied the Petition for Writ of Certiorari. *See Torromeo v. Town of Fremont*, 539 U.S. 923 (2003).

III. *The District Court Decision*

Having been denied relief by both the New Hampshire Supreme Court and this Court, Petitioners filed a three-count Complaint against the Town in the United States District Court for the District of New Hampshire, asserting claims for: (1) violation of the Takings Clause of the Fifth and Fourteenth Amendments of the United States Constitution; (2) violation of Petitioners' substantive due process rights; and (3) violation of Petitioners right to equal protection. Pet. App. at 29a-39a. The federal Complaint stated that the

purpose of the state-court action was "to obtain just compensation for a taking under the **U.S. and New Hampshire Constitutions**." *Id.* at 34a, ¶ 21 (emphasis added).

The Town moved to dismiss the federal Complaint on the grounds that the claims were barred by *res judicata* and/or the *Rooker-Feldman* doctrine. Pet. App. at 15a-16a. The District Court dismissed based on *Rooker-Feldman*, holding that Petitioners' "federal lawsuit [was] little more than a thinly disguised effort to reverse the New Hampshire Supreme Court's decision rejecting their claimed entitlement, under the Fifth Amendment, to the damages for the temporary 'taking' of their real property." *Id.* at 22a. The District Court alternatively held that the claims were barred by *res judicata* because the Fifth Amendment claim was in fact asserted and adjudicated in the state court proceeding, and the due process and equal protection claims could have been adjudicated in that proceeding. *Id.* at 26a-29a.

IV. *The First Circuit Decision*

Petitioners appealed to the United States Court of Appeals for the First Circuit. The First Circuit affirmed the District Court's dismissal of the federal takings claims on *res judicata* grounds.[1] Pet. App. at 1a-11a. The First Circuit rejected

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[1] The First Circuit chose not to address the *Rooker-Feldman* issue in light of its determination that dismissal was appropriate based on *res judicata* and in light of this Court's recent decision in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005). The Town asserts that the District Court's dismissal of Petitioners' claims based on the *Rooker-Feldman* doctrine was proper even after this Court's decision in *Exxon Mobil*.

Petitioners contention that they had not asserted federal takings claims in the state-court action, finding that

> [Petitioners] state-court complaint identified the Takings Clause of the Fifth Amendment to the United States Constitution as a basis for the cause of action. The complaint also cited *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), a Supreme Court case interpreting the Takings Clause. In addition, after losing in the New Hampshire courts, [Petitioners] filed a writ of certiorari with the United States Supreme Court claiming that the New Hampshire decision violated their rights under the federal Takings Clause. These filings demonstrate a federal takings claim was actually litigated in the ~~state-court~~ action . . . Indeed, [Petitioners] admitted as much in their federal complaint which states that the state-court proceedings were actions "to obtain just compensation for a taking under the U.S. and New Hampshire Constitutions."

Id. at 7a. The First Circuit concluded that Petitioners had asserted federal takings claims in the state-court action, that those claims had been decided, and, accordingly, that Petitioners were barred by *res judicata* from relitigating those claims in federal court.

The First Circuit also affirmed the District Court's dismissal of Petitioners' substantive due process and equal protection claims.[2] Pet. App. at 9a-10a. The First Circuit first recognized that a refusal to issue a building permit

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[2] Petitioners have not appealed the dismissal of their equal protection claims.

ordinarily does not implicate substantive due process. *Id.* at 10a. The First Circuit then concluded that in this case, the Town's decision not to issue building permits pursuant to an ordinance that was later found to be procedurally defective did not establish the use of government power for purposes of oppression, did not shock the conscience, and was not legally irrational. *Id.* Accordingly, the First Circuit dismissed Petitioners' substantive due process claims on the merits. *Id.*

REASONS FOR DENYING THE PETITION

I. THE DISMISSAL OF PETITIONERS' FEDERAL TAKINGS CLAIMS IS IN ACCORD WITH GENERAL PRINCIPLES OF *RES JUDICATA* AND CONSISTENT WITH THIS COURT'S DECISION IN *SAN REMO*

Petitioners first contend that the First Circuit erred by dismissing their federal takings claims based on *res judicata* because they never asserted federal takings claims in the state-court action. This contention is directly contradicted by Petitioners' own state-court filings, including:

- The state-court complaints which identify the Takings Clause of the Fifth Amendment as a basis for Petitioners' claims and spend more than a page citing this Court's decision in *First English* in support of their Fifth Amendment takings claims. Pet. App. at 75a-83a.

- Petitioners' joint brief to the New Hampshire Supreme Court which cites both the state and federal constitutions in support of their view that the trial court properly found that they were entitled to compensation for the temporary taking of their

property. Pet. App. at 19a ("The Town, by imposing the invalid Growth Ordinance, caused a 'taking' of plaintiff's property violating their protected right to use and enjoy their property as a fundamental right protected by **both our State and Federal Constitutions**. . . . (emphasis added)); *Id.* at 20a ("The right to use and enjoy one's property is a fundamental right protected by **both our State and Federal Constitution**. The **Fifth Amendment** of the United [States] Constitution provides, 'nor shall private property be taken for public use without just compensation'." (emphasis added)).

- Petitioners previous Petition for Writ of Certiorari which identifies the Questions Presented as "Liability of Fifth Amendment Taking" and "Remedy for Fifth Amendment Taking," and identifies the constitutional provision at issue as the "Takings Clause of the Fifth Amendment to the United States Constitution." Res. App. at 2b-3b. In addition, the Petition stated that "Torromeo and MDR each filed actions in the Rockingham County Superior Court for a taking under the U.S. and (New Hampshire) Constitutions." *Id.* at 10b.

The federal Complaint also confirms that Petitioners had asserted Fifth Amendment takings claims as part of the state-court action by stating that the purpose of the state-court action was "to obtain just compensation for a taking **under the U.S. and New Hampshire Constitutions**." Pet. App. at 34a, ¶ 21 (emphasis added). Petitioners current claims to the contrary are without merit and do not establish a compelling reason to grant the Petition.

Petitioners alternatively argue that even if they did assert federal takings claims in the state-court action, those claims were not ripe for adjudication and, therefore, are not barred by *res judicata*. Petitioners' argument, however, directly contradicts this Court's recent decision in *San Remo*. In *San Remo*, this Court held that state courts may hear a plaintiff's request for compensation under state law simultaneously with an alternative claim that the denial of compensation would violate the Fifth Amendment of the Federal Constitution. *San Remo*, 545 U.S. at 323. Petitioners asserted both state and federal takings claims in the state-court action and, pursuant to *San Remo*, the federal takings claims were ripe for adjudication.

Furthermore, even if the Court were to accept Petitioners' assertion that they did not assert federal takings claims or that the claims were not ripe for adjudication, the claims are still barred by issue preclusion pursuant to *San Remo*. In *San Remo*, this Court held that where state takings law is coextensive with federal takings law and the state court concludes that no taking has occurred under state law, a plaintiff's subsequent effort to bring a federal takings action in federal court is barred by issue preclusion. *San Remo*, 545 U.S. at 323. As Petitioners acknowledge, New Hampshire regards state and federal takings claims as equivalent. *See Sanderson v. Town of Candia*, 787 A.2d 167 (N.H. 2001); *Burrows v. City of Keene*, 121 A.2d 590 (N.H. 1981). The New Hampshire Supreme Court rejected Petitioners' takings claims. Pursuant to *San Remo*, Petitioners' efforts to revive those claims in federal court are barred by issue preclusion regardless of whether the federal takings claims were either asserted or ripe.

Petitioners next contend that certiorari is appropriate because there is a conflict among the Circuit's regarding the

preclusive effect of a state-court's adjudication of a takings claim pursuant to *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). As explained above, to the extent that such a conflict existed, the conflict was resolved by *San Remo*. *San Remo* makes clear that state and federal takings claims may be brought simultaneously in state-court actions. *San Remo*, 545 U.S. at 323. A plaintiff who chooses to assert state and federal takings claims simultaneously, as Petitioners did in this case, does so at his own risk and is barred by *res judicata* from attempting to later relitigate his federal claims in the federal courts. *Id*. *San Remo* also makes clear that, where state law provides that state takings claims are coextensive with federal takings claims, plaintiffs are barred by issue preclusion from attempting to later relitigate their federal claims in federal courts. *Id*. Plaintiffs, in short, have no right to have their federal takings claims heard in a federal forum. *Id*. *San Remo*, therefore, resolved any split that existed among the Circuits regarding the proper application of *Williamson*.

Petitioners next argue that appellate review is necessary because the First Circuit's decision potentially impacts their right to a jury trial and is inconsistent with this Court's decisions concerning the removal of federal takings claims. These issues are simply red herrings. Petitioners had a right to a jury trial in the state-court action, but instead chose to proceed with a bench trial. Petitioners, therefore, have no basis to argue that the First Circuit's decision deprived them of a right to a jury trial. Petitioners' contention that the *San Remo* decision is inconsistent with this Court's decision in *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997) also is without merit. Petitioners cite *City of Chicago* for the proposition that this Court has sanctioned the removal of federal takings claims even where state takings remedies have not been exhausted. The impact of *Williamson* was not

raised or addressed in *City of Chicago* and, in fact, *Williamson* is not even mentioned in the decision. Petitioners' suggestion that the *City of Chicago* decision is somehow at odds with *San Remo* and *Williamson* is based on a misunderstanding and/or misrepresentation of the *City of Chicago* decision. In any event, this case does not involve the removal of a federal takings claim and Petitioners have no basis to seek appellant review of a non-existent issue.

Finally, Petitioners argue that this Court should use this case to re-visit the *Williamson* decision. This case is not the appropriate vehicle for such review. Petitioners asserted federal takings claims in the state-court action and, thus, made the conscious decision to have both their state and federal takings claims decided by the state court. By doing so, Petitioners took themselves outside the *Williamson* decision. Thus, even if the Court were to reconsider *Williamson*, the result would be the same – Petitioners' federal takings claim still would be barred by *res judicata*. As a result, Petitioners have failed to state a compelling reason for this Court to reconsider *Williamson*.

II. THE FIRST CIRCUIT APPLIED THE CORRECT STANDARD WHEN IT DISMISSED PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIMS

Petitioners claim that the Town's decision not to issue the requested building permits based on the provisions of a procedurally defective ordinance constituted a violation of their substantive due process rights. The First Circuit concluded that this assertion alone was insufficient to establish a substantive due process claim. In doing so, the First Circuit held that

> The doctrine of substantive due process does not protect individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, **substantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest**. Although we have left the door slightly ajar for federal relief in truly horrendous situations, the threshold for establishing the requisite abuse of governmental power is a high one indeed.

Pet. App. at 9a. (emphasis added).

Petitioners now question whether the First Circuit employed the correct standard in dismissing its substantive due process claims. This Court, however, has consistently held that a plaintiff must establish the existence of "egregious and arbitrary government conduct" in order to state a valid substantive due process claim. *See Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198 (2003) (applying "egregious and arbitrary government conduct" standard to substantive due process claim in land-use context); *See also County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) ("[O]nly the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (holding that substantive due process serves to prevent governmental power from being "used for purposes of oppression"); *Rochin v. California*, 342 U.S. 165 (1952) (articulating the "shocks the conscience" test as a basis for substantive due process claim). The standard employed by the First Circuit to dismiss Petitioners' substantive due

process claims is completely consistent with the substantive due process standard articulated in the above cases.

This Court's decision in *Cuyahoga Falls* further confirms that the First Circuit applied the correct standard and properly dismissed Petitioners' substantive due process claims. In *Cuyahoga Falls*, the City of Cuyahoga (the "City") passed a site-plan ordinance authorizing Buckeye Community Hope Foundation ("Buckeye") to build a low-income housing complex. *Cuyahoga Falls*, 538 U.S. at 191. A group of citizens who opposed the project filed a formal petition requesting that the ordinance be repealed or submitted to a popular vote. *Id.* at 192. Pursuant to the City's charter, the filing of the referendum petition stayed the site plan's implementation until the vote. *Id.* As a result, the City refused to issue building permits to Buckeye while the referendum was pending. *Id.* The voters eventually approved the referendum and repealed the ordinance. *Id.* at 192-93. Buckeye challenged the referendum in state court and the Ohio Supreme Court determined that the referendum process was unconstitutional. *Id.* at 193. The City then issued the building permits to Buckeye. *Id.*

While the state litigation was pending, Buckeye filed a federal suit asserting, *inter alia*, that the City's refusal to issue the building permits constituted a substantive due process violation. *Cuyahoga Falls*, 538 U.S. at 193. The City moved for summary judgment and the District Court granted the motion on the grounds that the City's refusal to issue the building permits did not rise to the level of a substantive due process violation. *Id.* Buckeye appealed and the Sixth Circuit reversed, holding that there was a "genuine issue of material fact as to whether the City, by denying respondents the benefit of the lawfully approved site plan, engaged in

arbitrary and irrational government conduct in violation of substantive due process." *Id.*

The City appealed to this Court which reversed, finding that the City's "refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct." *Cuyahoga Falls*, 538 U.S. at 193. In reaching this conclusion, this Court recognized that "[i]n light of the charter's provision that '[n]o such ordinance [challenged by a petition] shall go into effect until approved by a majority of those voting thereon' . . . [the City's decision] not to issue the permits represented an eminently reasonable directive." *Id.*

In this case, Petitioners claim the Town attempted to enforce an ordinance that turned out to be invalid because of a procedural defect. As with the builder in *Cuyahoga Falls*, Petitioners do not allege any facts to support their assertion that the Town used its governmental powers for purposes of oppression, engaged in conduct that shocks the conscience, or acted in an otherwise egregious, arbitrary or irrational manner when it decided not to issue the permits. The First Circuit, thus, properly dismissed Petitioners' substantive due process claims in accordance with this Court's previous decisions.

Petitioners attempt to circumvent *Cuyahoga Falls* by arguing that this Court articulated a different standard for substantive due process claims in the land-use context in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). *Lingle*, however, simply held that the "substantially advances legitimate state interests" test is not the proper test for determining Fifth Amendment takings claims. *Id.* at 545. There is nothing in the *Lingle* decision that supports Petitioners' argument that this Court intended to alter its long-standing precedents regarding the standards for establishing

a substantive due process violation. Petitioners arguments to this effect constitute a misguided effort to manufacture a basis for this Court to grant the Petition.

In any event, the *Lingle* decision states that "[t]he 'substantially advances' formula suggests a means-end test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose . . . a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Id.* at 542 (emphasis in original). The "substantially advances" formula, therefore, is a restatement of the "egregious and arbitrary" formula that this Court has consistently applied to substantive due process claims. The First Circuit, thus, applied the proper standard and properly dismissed Petitioners' substantive due process claim. Petitioners have failed to assert any compelling reasons for this Court to review that decision.

CONCLUSION

Petitioners have failed to satisfy their burden of establishing compelling reasons for this Court to grant the Petition. Therefore, the Town respectfully requests that the Petition be denied.

Respectfully submitted,

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APPENDIX

No.

In The

Supreme Court of the United States

HENRY TORROMEO AND MDR CORPORATION,
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v.

TOWN OF FREMONT,
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On Petition for Writ of Certiorari To
The Supreme Court of New Hampshire

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QUESTIONS PRESENTED

1. **Liability for a Fifth Amendment Taking:** When a state's highest court declares a growth control regulation "invalid *ab initio,"* but a town had enforced that illegal regulation in excess of its police powers against a specific piece of property, is the town liable to the affected property owner for a taking because it has failed to "substantially advance legitimate state interests"? *(Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980)).

2. **Liability for a Fifth Amendment Taking:** Alternatively, when a state's highest court declares a growth control regulation "invalid *ab initio"* but a town had enforced that regulation against a specific piece of property, should that illegal municipal conduct be considered under the "character of government action" factor set forth in *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1.978), as one element to determine whether the town is liable for a taking?

3. **Remedy for a Fifth Amendment Taking:** Does the "self-executing character" of the Takings Clause compel the payment of "just compensation" to an aggrieved property owner for the time period in which a growth control regulation, declared "invalid *ab initio"* by a state's highest court, was enforced against a specific piece of property? *(First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987)).

PETITION FOR WRIT OF CERTIORI

Henry Torromeo and MDR Corporation ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of New Hampshire, dated December 13, 2002. Appendix ("App.") 1.

OPINIONS BELOW

The opinion of the Supreme Court of New Hampshire is reported at 813 A.2d 389 (N.H. 2002). (App. 1-6.) Orders of the New Hampshire Superior Court awarding Petitioners monetary damages (App. 7-17), and finding liability on the part of the Town as a matter of law for its land-use decisions (App. 18-25), are not reported.

JURISDICTION

The judgment of the New Hampshire Supreme Court was entered on December 13, 2002. (App. I.) On February 12, 2003, Justice Sourer extended the time to petition for certiorari to and including April 14, 2003. (App. 55.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use without just compensation." It is applicable to the States through the Fourteenth Amendment,[1]

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[1] See *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001), citing *Chicago, B. & Q.R. Co. v. Chicago,* 166 U.S. 226 (1897).

which provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Article 12, Part 1 of the New Hampshire Constitution, the State's corollary to the Takings Clause, provides in pertinent part: "But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people." (App. 39.) This provision has been interpreted to require the payment of compensation for a taking. *Burrows v. Keene,* 432 A.2d 15, 19 (N.H. 1981).

STATEMENT OF THE CASE

Three points need to be made at the outset. First, the key fact in this case is that the Town of Fremont, New Hampshire (the "Town"), has applied and enforced an *illegal* growth control ordinance – so declared by the State's highest court – to inhibit otherwise legal development of Petitioners' land.

Second, Petitioners do not dispute that the Town has a legitimate interest to control growth. However, Petitioners *do* contest the constitutionality of the Town's actions when it enforced an illegal law against them. Certiorari should be granted to clarify that a municipality can violate the Takings Clause when it enforces an illegal land-use law, which a court declares was invalid from the start, and refuses to provide the constitutional remedy of "just compensation" promised by the Fifth Amendment.

Third, the posture of this case is a challenge to government action applying a land-use regulation to specific parcels of land. This is not a facial challenge against the constitutionality of an ordinance. Last term, the Court stated

that the specter of takings liability rises in as-applied cases such as this one. See *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,* 535 U.S. 302, 334 (2002).

A. Petitioners' Plans to Build 19 New Homes in Fremont, New Hampshire.

Originally part of Exeter, New Hampshire until it was incorporated in 1764, the Town of Fremont (the "Town") was first named "Poplin" after a prosperous mill town in England.[2] In 1854, the Town was re-named in honor of John C. Fremont, the first presidential candidate of the Republican party, who lost to Democrat James Buchanan in the 1856 election. Today, Fremont is a bedroom community of suburban Boston, a quiet town of neighborhoods that contain large residential lots with homes built from the same hardwood trees sustained since colonial times.

This case concerns two residential subdivisions in the Town. Petitioner MDR Corporation owned a 14-lot subdivision known as "Glidden Hill Estates." Petitioner Henry T orromeo owned the last five lots in a 27-lot

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[2] See www.seacoastonline.com/living/fremont.htm (last visited Apr. 8, 2003). Famous for its heavy growth of high quality hardwoods, the English Crown had reserved the Town's best trees for ship masts, but the Townspeople spirited off the remainder of the hardwoods to construct their homes and barns. Alarmed by the timber harvests, the royal Governor dispatched a surveyor to inspect the local mill for illegally cut mast trees. In 1734, the Mast Tree Riot took place in the Town, where locals rebelled by cutting down the tall trees prior to the surveyor's arrival. The Townspeople then later returned disguised as Indians and ambushed ten of the surveyor's troops. See www. newhampshire.com/pages/histmarkerseacoast.cfm (last visited Apr. 8, 2003).

subdivision known as "Mason's Corner." Both Petitioners desired to build homes on their lots and then sell the improved parcels. The Fremont Planning Board had fully reviewed and approved both projects to accommodate single-family homes.[3]

In March of 1999, the Town "adopted" the subject Growth Control Ordinance (the "Ordinance"), which gave the Planning Board authority to limit the number of building permits for residential units. (App. 45-51.) On April 14, 1999, the Fremont Planning Board acted on this authority by imposing "Growth Control and Permit Limitations" to restrict the number of building permits that it would issue to property owners during the year April 14, 1999, through April 13, 2000. (App. 52-53.)[4]

After the Ordinance's effective date, the Planning Board approved the Glidden Hill project and MDR requested six building permits to construct single-family homes at the site. The Town applied the Ordinance to MDR's project, granted only five permits, and told MDR it would have to wait at

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[3] "Navigating the subdivision approval process in New Hampshire is no small task. In accordance with zoning and subdivision regulations, Petitioners were obligated to prepare perimeter surveys, evaluate the topography of the property, perform high intensity soil surveys, and develop fully engineered plans showing all roadways and utilities. Additionally, Petitioners were required to secure various state permits, including dredge and fill permits, site specific permits, and curb cut permits.

[4] The Planning Board's "Growth Control and Permit Limitations" determined that a maximum of twenty-six (26) permits for residential construction could be issued throughout the Town, in the year from April 14, 1999 through April 13, 2000. (App. 52, ¶2.). Once a permit was issued, a builder had only 30 days to begin construction or else the permit would lapse. (App. 53, ¶313.)

least a year, until April 2000, at the earliest until additional permits for Glidden Hill could issue. After the Town issued only five permits, MDR applied for permits on the remaining nine lots to fully build-out the subdivision, which the Town also denied.

With regard to Mason's Corner, Torromeo personally owned the last five remaining house lots in the 27-lot subdivision. (He had previously built homes on and sold the other 22 lots.) This project was recorded with the county and eligible for building permits as of February 6, 1997 – more than two years before the Town adopted the Ordinance in March 1999. Because plats were recorded prior to the Ordinance, Mason's Corner qualified as a vested subdivision and was "exempt from all subsequent changes [in] zoning ordinances...for a period of four years .... " See RSA 674:39. (App. 43.) Nonetheless, when Torromeo applied for building permits on the five remaining lots in September 1999, the Town ignored Mason Corner's vested status and refused to issue the permits because the maximum number of approvals allowed by the Ordinance had been granted by that time.

A builder with a buildiiag lot, but no building permits, is denied use of his property. In addition to complying with all subdivision requirements, both MDR and Torromeo had built and paved the roads necessary to accommodate their plans, in reliance on prior Town and state approvals. See *supra* n. 3. Consequently, for roads alone, MDR spent over $225,000 and Torromeo spent over $775,000 for their respective projects. With unimproved lots valued at $85,000 each, both MDR and Torromeo could not build, had nothing of value to sell, and were not in a financial position to start over in another community, because their capital was tied up in the Town of Fremont.

B. The New Hampshire Courts Decide That the Growth Control Ordinance is "Invalid, *Ab Initio,*" and That the Town Must Issue Building Permits to the Petitioners.

Ordinarily, it would have been acceptable for the Town to deny Petitioners' building permits for a period of time. Except in this case there is a crucial distinction. The Town denied the permits based on an Ordinance that was ultimately deemed *illegal* by the New Hampshire courts, because it lacked the statutory requirements to support a valid growth control law.

After their respective building permits were denied, MDR and Torromeo each filed suits against the Town for injunctive relief to compel permit issuance. In the MDR suit, New Hampshire Superior Court Justice Walter Murphy granted the requested injunction in a decision dated December 27, 1999. (App. 28-31.) He decided that the permits should have been issued because the Ordinance was "invalid, *ab initio*"[5] for failure to meet requirements established by the New Hampshire legislature. (App. 30.) The Town appealed to the New Hampshire Supreme Court. On June 26, 2000, it summarily affirmed Justice Murphy's decision that the Ordinance was "invalid, *ab initio.*" (App. 27.)

In a nutshell, the lower courts found the Ordinance illegal because it was never supported by a validly enacted Capital Improvement Program ("CIP"), a statutory prerequisite in New Hampshire for any growth control ordinance. See RSA 674:22 (App. 42.) A CIP contemplates the orderly

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[5] Or, "[f]rom the beginning." *Black's Law Dictionary* 4 (7th ed. 1999).

construction of infrastructure projects like roads and sewers to control the timing of growth and to accommodate the community's projected needs. Under New Hampshire law, the local legislative body (known as the "Town Meeting") may regulate growth by authorizing the Planning Board "to prepare and amend a recommended program of municipal capital improvement projects over a period of at least 6 years." See RSA 674:5 (App. 41). To fully realize local democratic processes and foster public input, New Hampshire law directs that the Planning Board must publish a "warrant article" that "distinctly state[s]" the "'subject matter of all business to be acted upon at theTown Meeting ...."[6] RSA 39:2. (App. 40.) Under New Hampshire law, therefore, the Town was required to publish a warrant article informing the public that the Planning Board would be preparing a CIP.

But the Town never published such a warrant providing notice of the preparation of a CIP. As a result, the Town's citizens were deprived of a full and fair opportunity to speak to the vital issue of how, when, and where their community should grow. Without a valid CIP, the New Hampshire courts decided that the Ordinance - which propped the Town's denial of Petitioners' building permits - was "invalid, *ab initio*" and never should have been enforced. (App. 27, 30.)[7]

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[6] It has long been the law of [New Hampshire] that the purpose of [the warrant] requirement is to inform the inhabitants of the business upon which they are called to act in the meeting, to bring before the town substantially and intelligently the subject with which it has to deal." *Opinion of the Justices,* 134 A.2d 281, 283 (N.H. 1957) (citations omitted).

[7] Superior Court Judge Murphy rejected the Town's position that, at the end of its March 11, 1987 Town Meeting, a motion was made to appoint a committee to study the development of a future

Accordingly, on June 26, 2000, the Town issued the nine remaining building permits to MDR so homes could be built at Glidden Hill.

With regard to Mason's Corner, while the Town denied the building permits by color of the illegal Ordinance, Torromeo never even had to contest the Ordinance's statutory validity. His case was simpler because his last five lots were "vested" under New Hampshire statute, RSA 674:39 (see App. 43), and by law were exempt from the permit limitations of the Ordinance. Thus, on January 31, 2000, Superior Court Justice Richard Galway determined that building permits should issue for Mason's Corner. (App. 32-38.) The Town did not appeal this decision. Ultimately, in February 2000, the Town issued the five permits enabling Torromeo to build the last homes at Mason's Corner.

C. Petitioners' Takings Lawsuits in State Court for Compensation.

Neither Torromeo's nor MDR's odyssey in the New Hampshire courts was over yet. Although permits were eventually issued to them, they had received no economic damages for the losses they sustained while the Town applied the illegal Ordinance to their respective properties. To obtain the remedy of "just compensation" that the Fifth Amendment makes available, Torromeo and MDR each filed actions in Rockingham County Superior Court for a taking under the U.S. and (New Hampshire) Constitutions.

CIP. The motion was made after the Town Meeting had already considered 43 other published warrant articles under other business. But not a single pre-published warrant notified the public that a CIP would be addressed. (App. 30.)

At the start o takings phase of their suits, MDR and Torromeo filed motions for summary judgment on the issue of liability. On October 3, 2000, the trial Court initially denied the motions in a one-sentence order. (App. 26.) The trial court apparently accepted the Town's argument that the Ordinance was "merely" defective procedurally and the law itself needed to be "unconstitutional" before a taking would arise.

MDR and Torromeo then filed a "Request for Ruling of Law,"[8] arguing that the Town's refusal to issue building permits in reliance on the "invalid, *ab initio*" Ordinance was in and of itself an unconstitutional taking. On January 17, 2001, Superior Court Justice Kenneth McHugh reversed himself. He now believed that an award of damages *was* appropriate and Petitioners did "not have to prove the Ordinance is unconstitutional" to recover monetary relief. (App. 24.)

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[8] This procedure is allowed by New Hampshire Superior Court Rule 141 (parties may request "interlocutory orders...relative to proceedings preparatory for a hearing on the merits").